

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

JOE COMES, and RILEY PAINT, INC.,
an Iowa corporation,

Plaintiffs,

v.

MICROSOFT CORPORATION,
a Washington corporation,

Defendant.

No. CV-05-562

**LR 81.1(a)(2) LIST OF PENDING
MATTERS**

Pursuant to LR 81.1(a)(2), Microsoft submits the following list of all matters pending in the state court that may require resolution by this Court:

1. Plaintiffs' Motion to Amend Petition, filed September 16, 2005, and
2. Microsoft's request for the court to enter an order requiring Microsoft to produce to Plaintiffs all of the Oracle documents. See attached.

Microsoft is filing a motion for an extension of time to file a response to the motion to amend until 20 days after the Judicial Panel on Multidistrict Litigation has determined whether this case should be transferred to the United States District Court for the District of Maryland, pursuant to 28U.S.C. § 1407. Microsoft is also filing a motion to stay other proceedings pending the transfer decision.

/s/ Edward W. Remsburg
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PROOF OF SERVICE

THE UNDERSIGNED CERTIFIES THAT THE FOREGOING
INSTRUMENT WAS SERVED UPON ALL PARTIES TO THE
ABOVE CAUSE TO EACH OF THE ATTORNEYS OF
RECORD HEREIN AT THEIR RESPECTIVE ADDRESSES
DISCLOSED ON THE PLEADINGS ON

October 13, 2005

BY ☒ U.S. MAIL ☐ FAX
☐ HAND DELIVERED ☐ PRIVATE CARRIER

SIGNATURE /s/ Ann Baier

JVANRYSW\469880.1\WP21270001

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September 27, 2005

The Honorable Scott D. Rosenberg
Judge, Fifth Judicial District State of Iowa
Polk County Courthouse
500 Mulberry Street
Des Moines, Iowa 50309

Re: Comes v. Microsoft
No. CL82311

Dear Judge Rosenberg:

On July 22, 2005, this Court granted plaintiffs' motion to compel Microsoft to produce, *inter alia*, all documents that had previously been produced in *Sun Microsystems, Inc. v. Microsoft Corp.* Among these documents were more than 2,700 pages of materials that were originally produced by Oracle Corporation in *United States v. Microsoft Corp.* and *New York v. Microsoft Corp.* (the "Oracle Documents").

According to Oracle, those documents fall into three categories: (1) various inter-license and software agreements between Oracle and others entered into between 1994 and 1998; (2) position papers and other communications reflecting Oracle's position on proposed settlements and remedies in the Microsoft antitrust litigation; and (3) communications between Oracle government relations personnel and others concerning matters pertaining to the Microsoft litigation as well as to strategy and coordination of the Microsoft antitrust litigation. Microsoft believes that the documents falling into categories (1) and (3) are generally supportive of Microsoft's position in this litigation. The documents falling into category (2) are - coming from a competitor of Microsoft - hostile to Microsoft.

Because Oracle had designated all of the documents as "Highly Confidential," they were subject to the Amended Stipulated Protective Order entered in *In re Microsoft Corp. Antitrust Litigation*, MDL Docket No. 1332 (D. Md.) (the "Protective Order"). Pursuant to ¶ 22 of the Protective Order, Microsoft notified Oracle on August 4 that Microsoft had been ordered to produce all of the Oracle Documents and that, if Oracle had any objection to that production, it could seek an order from this Court.

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On September 22, Oracle's counsel informed Microsoft that Oracle had decided not to exercise its remedy under the Protective Order, but instead had negotiated an agreement directly with plaintiffs in this action by which Oracle would authorize for production only the documents falling into a subset of the Oracle Documents -- those falling into category (2) described above but not those falling into categories (1) and (3). As a result, Oracle has told Microsoft to produce only about 1,100 of the more than 2,700 pages of Oracle Documents.

The agreement between plaintiffs and Oracle runs contrary to this Court's July 22 Order as well as the Protective Order. This Court's July 22 Order requires Microsoft to produce all documents previously produced in *Sun Microsystems, Inc. v. Microsoft Corp.*, No. C-02-01150 PVT (N.D. Cal.), which includes all Oracle Documents. The Protective Order provides that Oracle's remedy if it objects to the production is to seek a court order.

Moreover, the agreement would exclude from production those Oracle Documents falling into categories (1) and (3), which, as noted above, are helpful to Microsoft's case. Plaintiffs sought an order requiring Microsoft to produce all documents previously produced in various underlying cases. Plaintiffs' motion was litigated on that basis, and there was never any suggestion of importing into this record only those documents that might help plaintiffs' cause. Plaintiffs should not be permitted to enter into a side deal designed to create a skewed and misleading discovery record in this case.

Microsoft therefore asks this Court to enter an Order requiring Microsoft to produce to plaintiffs all of the Oracle Documents. Such an Order would avoid the possibility that a private deal between plaintiffs and Oracle will skew the process and create a distorted record. All of the Oracle Documents should be available to the parties at trial. A proposed Order is enclosed.

Respectfully submitted:

AHLERS & COONEY, P.C.

By:

Edward W. Remsburg

EWR:jv

Enclosure

cc: Roxanne B. Conlin
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September 30, 2005

HAND DELIVERED

The Honorable Scott D. Rosenberg
Judge, Fifth Judicial District State of Iowa
Polk County Courthouse
500 Mulberry Street
Des Moines, Iowa 50309

Re: Comes v. Microsoft
No. CL82311

Dear Judge Rosenberg:

On September 27, 2005, I sent to the Court a letter and proposed Order concerning production of the "Oracle Documents" in this action. By letter of September 29, 2005, plaintiffs' counsel requested that the matter raised in my September 27 letter be addressed by motion. Microsoft respectfully requests that the Court treat my September 27 letter as a motion.

Respectfully submitted:

AHLERS & COONEY, P.C.

By: /s/

Edward W. Remsburg (NJD)

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